case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him."
(Emphasis provided)

Thus on the evidence relied on by the prosecution in this case, the charge was sufficient and valid. In fact in every case where an accused is charged under section 39B of the Act and the evidence relied on is possession, custody and control of a dangerous drug of an amount which invokes the statutory presumption under section 37(da), the omission of the words "on his own behalf or on behalf of any other person" cannot be said to vitiate the charge and is not fatal to the charge.

Therefore our answer to Question 1 is in the negative. Question 2 does not arise.

Solicitors: *Manjit Singh & Co.*

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. DHANOA SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) July 17 & September 26, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 9 of 1987]

Land Law – Charge – Chargor in default – Application for sale of charged lands – Interest allowed to be claimed – Whether O.42 r.12, R.H.C. 1980 applicable – Procedure for recall of loan – Validity of order of sale – National Land Code 1965, ss. 254, 255 & 257.

Civil Procedure – Interest rate payable under order made pursuant to s. 257 of National Land Code – Whether O.42 r.12, R.H.C. 1980 applies – No judgment debt – R.H.C. 1980, O.20 r.11 & O.42 r.12.

The appellant had applied for the sale of certain lands belonging to the respondent to satisfy the sum of $2,219,682.70 due to them. The learned trial judge made an order for the sale of the charged lands by public auction under section 257 of the National Land Code to satisfy the sum due, with interest thereon at the rate of 8% per annum from November 29, 1986 to the date of realisation. The appellant appealed against that part of the order directing that interest at 8% be paid by the respondent to the appellant. The respondent cross-appealed against the order of sale made by the High Court.

Held: (1) since there was no judgment debt in this case, the learned judge was wrong to apply Order 42 rule 12 of the Rules of the High Court 1980;

(2) Order 42 rule 12 Rules of the High Court 1980 has no application to any court order made pursuant to section 257 of the National Land Code. That part of the order dealing with interest should therefore be deleted and substituted with an order to pay interest at the rate agreed between the parties from November 29, 1986 to the date of the public auction sale;

(3) in this case, when the notice of demand was given, the appellant acted under the provisions of the registered charge and not under section 255 of the National Land Code. The statutory notice was issued under section 254 and not pursuant to section 255 of the Code and the provision of section 255 which prescribes a minimum period of one month to be provided for the repayment of the principal sum secured by a registered charge was not applicable;

(4) the omission in the order for sale of the charged lands for the Registrar of the High Court to fix a reserve price for the sale as required by section 257(1)(d) of the National Land Code did not vitiate the court order but may be remedied by a subsequent application to the court;

(5) although section 257(2) of the National Land Code confers a discretionary power on the High Court to regulate the sale by public auction when more than one parcel of land is involved and enables the court to give directions whether the charged lands be sold individually or in lots, such directions need not be considered at the time when the application to sell the charged lands is heard but may be dealt with at a later date before the date of the public auction;

(6) the cross-appeal against the order for sale made by the High Court is therefore dismissed.

Cases referred to:

(1) *Supreme Finance (M) Bhd.* v. *Koo Sin Ken* [1987] 1 M.L.J. 296.

(2) *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95.

SUPREME COURT.

H. Y. Too for the appellant.

A. Kanesalingam for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the judgment of the court): On the application of the chargee/appellant (hereinafter called the appellant), the learned judge ordered that the charged lands belonging to the chargor/respondent (hereinafter called the respondent) be sold by public auction under section 257(1)(a) of the National Land Code 1965 to satisfy the sum of $2,219,682.70 due to the appellant as at November 28, 1986 with interest thereon at the rate of 8% per annum from November 29, 1986 to the date of realisation.

This is an appeal by the appellant against that part of the court order directing that interest at 8% per annum be paid by the respondent to the appellant. There is a cross-appeal by the respond-

ent against the order for sale made by the High Court.

In ordering that only 8% per annum interest rate be paid by the respondent to the appellant, the learned judge purported to rely on Order 42 rule 12 of the Rules of the High Court 1980 and a recent decision of this court in the case of *Supreme Finance (M) Bhd.* v. *Koo Sin Ken.*[1] At p. 297, the learned Lee Hun Hoe C.J. (Borneo) in giving the judgment of this court said:

"The question is whether the debt merged in the judgment. Clearly, where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under Order 42 rule 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the court directs from the date of judgment until satisfaction. Order 42 rule 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement ..."

With respect, we accept and agree with this exposition of the law. In our opinion, the *Supreme Finance* case is clearly distinguishable from the facts of the present case. There, the only issue in the appeal concerned the rate of interest to be given after date of judgment. Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge. In *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.*[2], the appellant is the chargee of certain lands on the security whereof the respondent as chargor was given a loan of $1,250,000.00 bearing interest at 11% per annum. The chargor defaulted in payment on a number of instalments, as well as interest. Notice of default was given as in Form 16D under section 254 of the National Land Code. The High Court made an order that the charged lands be sold by public auction to recover the sum of $1,401,596.24 due to the appellant as on August 31, 1970, together with interest thereon at 11% per annum from September 1, 1970 to the date of the order and further interest thereafter at 6% per annum to the date of payment or realisation. The then Federal Court allowed the appeal and at p. 96, Ong C.J. (Malaya) said:

"The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that section 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly, expenses connected with the sale and then as follows:—

'(c) Thirdly, in the payment to the chargee of the *total amount due under the charge at the time of sale.*'

The words in italics, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale. I would accordingly allow the chargees' appeal and direct that the order of court dated February 18, 1971 be amended to allow interest on the sum then due at the rate of 11 per cent per annum until the date of sale."

We are in complete agreement with the law as expounded by the learned Chief Justice of the High Court in Malaya.

Applying this to the facts of this case and since there was no judgment debt, the learned judge was wrong to apply Order 42 rule 12. In our opinion, the *Supreme Finance* case is only authority for the proposition that the maximum rate of interest which may be allowed by the High Court in a judgment debt is 8% per annum until full realisation. And Order 42 rule 12 of the High Court Rules 1980 has no application to any court order made pursuant to section 257 of the National Land Code 1965. We therefore allow the appellant's appeal with costs by deleting that part of the order dealing with interest and substitute the following order immediately after November 28, 1986:

"with interest thereon at the rate agreed to between the parties from November 29, 1986, to the date of the public auction sale."

We turn now to deal with the cross-appeal.

It was the submission of learned counsel for the respondent that the order for sale by public auction of the respondent's lands should not have been made by the High Court because the appellant had given a period of seven days only for settlement of the debit balance of $1,739,082.50 as at July 31, 1985 in their notice of default served on the respondent prior to applying to the court for an order for sale when section 255 of the National Land Code 1965 prescribes a minimum period of one month to be provided for repayment of the principal sum secured by a registered charge. For the appellant, it was argued that the order for sale was properly made by the learned judge and that they had complied with the relevant provisions of the National Land Code 1965.

The appellant appeared to have adopted the following procedure when they decided to recall the loan given to the respondent before resorting to the statutory remedies laid down by the National Land Code 1965. Firstly, the appellant instructed their solicitors to send a notice in writing to the respondent on September 4, 1985 demanding payment of the debit balance of $1,739,082.50 with interest thereon within seven days from date thereof, failing which legal proceedings would be commenced against them for recovery of the same. In making this demand, the appellant seemed to have acted under section 10.01(h) of Article X of the Annexure attached to the registered charge which provides, *inter alia,* that the whole of the principal amount of the loan together with interest thereon shall become due and immediately payable on demand in writing within seven days –

"(h) if MIMB decides in its sole and absolute discretion that the continuation of the loan would be likely to be detrimental to its own position or otherwise undesirable or that its security hereunder is in jeopardy."

Secondly, when the respondent failed to repay the sum demanded with interest within the prescribed period, they shall be deemed to commit a breach of the agreement and registered charge (see section 10.01(a)). And after the breach had continued for more than thirty days, the appellant's solicitors sent a statutory notice in Form 16D under section 254 of the National Land Code 1965 requiring the respondent to remedy the breach and to pay up the sum of $1,739,082.50 and interest lawfully due within seven days from date thereof, otherwise application would be made to the High Court for an order for sale of the charged lands.

It is clear from the summary of the facts that when the appellant despatched the notice of demand dated September 4, 1985, they acted pursuant to section 10.01 of Article X of the Annexure attached to the registered charge and not under section 255 of the National Land Code 1965. It is equally clear from the statutory notice that it was issued under section 254 and not pursuant to section 255 of the Code. This ground therefore fails.

Learned counsel for the respondent next argued that the order for sale of the charged lands did not require the Registrar of the High Court to fix a reserve price for the purpose of the sale as required by section 257(1)(d) of the National Land Code 1965. In our opinion, such an omission would not vitiate the court order but may be remedied by a subsequent application made under Order 20 rule 11 of the Rules of the High Court 1980. We like to point out, however, that in the originating summons taken out by the appellant, there was a prayer for an order "that the date of the auction sale, reserve prices and other directions relating to the auction sale be fixed by the Senior Assistant Registrar." As the respondent is unable to show that it had in fact been prejudiced by this non-inclusion, we find there is no merit in this ground of appeal.

Lastly, learned counsel for the respondent complained that the order for sale was made without due regard to the provisions of section 257(2) of the National Land Code 1965. This sub-section (2) confers a discretionary power on the High Court to regulate the sale by public auction when more than one parcel of land is involved, and the court may give directions whether the charged lands be sold individually or in lots. In our judgment, these directions need not be considered at the time when the application to sell the charged lands is heard but may be dealt with at a later date before the date of the public auction. This ground also fails.

For the above reasons, the cross-appeal is dismissed with costs to the appellant to be taxed. The deposit is returned to the appellant.

Order accordingly.

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